No. 87-560

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

FMC WYOMING CORPORATION,
Petitioner,

v.

DONALD P. HODEL, Secretary of the Interior, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF OF THE NATIONAL COAL ASSOCIATION, AMERICAN MINING CONGRESS, EXXON COAL U.S.A., INC., AMAX INC., PEABODY COAL COMPANY AND COLORADO-UTE ELECTRIC ASSOCIATION, INC. AS AMICUS CURIAE IN SUPPORT OF THE PETITIONER

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The National Coal Association, the American Mining Congress, Exxon Coal U.S.A., Inc. ("Exxon") AMAX Inc. ("AMAX"), Peabody Coal Company ("Peabody") and Colorado-Ute Electric Association, Inc. ("Colorado-Ute") respectfully submit this amicus curiae brief in support of FMC Wyoming Corporation's petition for a writ of certiorari. Pursuant to Supreme Court Rule 36.1, the parties' written consent to file this brief has been obtained and filed with the Clerk of this Court.

INTEREST OF AMICUS CURIAE

The National Coal Association and the American Mining Congress are trade associations whose members include owners of federal coal leases issued prior to enactment of the Federal Coal Leasing Amendments Act of 1976 ("FCLAA") and who therefore are adversely affected by the decision of the United States Court of Appeals for the Tenth Circuit. Exxon, AMAX and Peabody are three of the six largest holders of federal coal under pre-FCLAA leases; together they hold pre-FCLAA coal leases covering more than three billion tons of coal.[1] Exxon and AMAX have appeals of coal lease readjustments similar to FMC's pending in the U.S. District Court for the District of Wyoming.[2] Peabody has an appeal pending in the U.S. District Court for the District of Columbia.[3] Colorado-Ute is a not-for-profit rural electric utility in Colorado that buys federal coal under long-term coal supply contracts. Under the terms of its contracts, which are typical in the industry, Colorado-Ute—and thus its customers—may be required to bear the increased royalties required by the Tenth Circuit's decision.

STATEMENT OF THE CASE

A brief statement of the background to this case is helpful in understanding the arguments of amicus curiae.

In 1920, Congress passed the Mineral Leasing Act, 30 U.S.C. § 181, *et seq.*, and authorized the Secretary of the

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[1] U.S. Congress, Office of Technology Assessment, *Potential Effects of Section 3 of the Federal Coal Leasing Amendments Act of 1976—A Special Report*, 31 OTA-ITE-300 (March 1986).

[2] *Exxon Coal U.S.A., Inc. v. Hodel*, No. C87-0088 (D. Wyo. filed March 4, 1987); *Meadowlark Farms, Inc. v. Hodel*, No. C87-0024 (D. Wyo. filed Jan. 18, 1987) (Meadowlark Farms is a wholly owned subsidiary of AMAX).

[3] *Peabody Coal Company, et al. v. Hodel*, No. 87-1359 (D.D.C. filed May 20, 1987).

Interior to issue leases on the public lands for the development of coal, oil and gas and certain other minerals. The type of lease created was different depending on the mineral. For the development of coal, Congress authorized the Secretary to issue a lease for an "indeterminate period" upon the condition that "at the end of each twenty-year period succeeding the date of the lease such readjustment of terms and conditions may be made as the Secretary of the Interior may determine, unless otherwise provided by law at time of the expiration of such periods." Section 7 of the Mineral Leasing Act of 1920, 30 U.S.C. § 207 (1970). The leases issued by the Secretary to FMC, Exxon, AMAX, Peabody and others track this statutory language, but also specifically limit the Secretary to a "reasonable" readjustment of the terms and conditions of the lease. *See* FMC's Appendix F, 63A.

Relying on the indeterminate period granted by these federal leases, coal companies such as FMC, Exxon, AMAX and Peabody invested huge sums of money to develop coal mines. Likewise, utility companies such as Colorado-Ute invested huge sums of money to build electric power plants which would depend on the federal coal for fuel. Furthermore, to protect their investments, coal companies and utilities frequently entered into long-term coal supply contracts, typically 35 years in duration. These long-term contracts—which extend longer than the 20-year readjustment interval—generally recognize that lease terms can be changed upon readjustment, and provide for a "pass through" of increased royalties. However, the parties to these long-term contracts expected the readjustment to be "reasonable," as provided in the lease contracts. For more than half a century, the Secretary's readjustments were reasonable.

In 1976, Congress passed the Federal Coal Leasing Amendments Act ("FCLAA"), Pub. L. No. 94-377. This

statute radically altered the kind of lease to be issued in the future; nearly all of the essential terms of the lease were changed. One of the most important of these changes was to increase the minimum royalty from five cents per ton to 12½% of the value of the coal. FCLAA says nothing about whether the terms governing new leases must apply upon readjustment of pre-existing leases, and the legislative history "sheds little light" on the question. Solicitor's Opinion M-36939, *Whether Leases Issued Prior to August 4, 1976, Subject to Readjustment After that Date Must be Readjusted to Conform to the Federal Coal Leasing Amendments Act of 1976*, 88 I.D. 1003, 1007 (1981).

After the enactment of FCLAA, the Secretary began taking the position that the terms of FCLAA governing new leases must be applied upon readjustment of pre-FCLAA leases, and that he has no discretion to consider the reasonableness of such terms as applied to any particular lease. Since a large number of the pre-existing leases had been issued in the 1960s, the Secretary's position was not implemented on a wide scale until the last few years, when the 20-year anniversary date of those leases began to expire. Most of the appeals of these lease readjustments are still pending before the Interior Board of Land Appeals, or are in early stages of review in various United States District Courts.

The decision below was the first occasion for a United States Court of Appeals to address whether the terms of FCLAA governing new leases are mandatory upon readjustment of pre-FCLAA leases. The court reversed a decision of the U.S. District Court for the District of Wyoming, and found that FCLAA was a law that "otherwise provided" under Section 7 of the Mineral Leasing Act of 1920. The court consequently held that Congress had vitiated the contractual right to a "reasonable" re-

adjustment contained in pre-FCLAA leases. The court acknowledged there was no indication in FCLAA that Congress intended this result, but held that FCLAA must apply because there was nothing in the Act indicating a contrary intention.

REASONS FOR GRANTING CERTIORARI

This is one of the most important cases ever brought by the Western coal industry. More than 400 leases covering some 12.2 billion tons of coal are involved.[4] At stake is the nature of the contractual relationship between the United States and the companies it encourages to develop minerals on the federally owned lands; these federal lands comprise one third of the Nation's land and about 50 percent of the West.[5] Also at stake are hundreds of millions, perhaps billions, of dollars. Supreme Court review is necessary to address the important national issues presented in this case, and to resolve the flood of cases now pending in the Interior Board of Land Appeals and numerous United States District Courts.

I. The Case Presents Questions of National Importance.

Subsumed within FMC's question presented for review are three critical questions that go to the heart of Congress's power to alter the terms of contracts between the United States and private parties:

(1) In enacting the Mineral Leasing Act of 1920, did Congress reserve the unusual power to change, in any way it wanted to, the terms of federal coal leases issued pursuant to that Act?

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[4] *See infra* note 9.

[5] Public Land Law Review Commission, *One Third of the Nation's Land, A Report to the President and to the Congress* 22-23 (1970).

(2) If Congress reserved such an unusual power, did it exercise that power when it enacted the Federal Coal Leasing Amendments Act of 1976—and thus take away the lessees' contractual right to a "reasonable" readjustment—even though Congress did not say so?

(3) If Congress reserved the power in 1920, and if Congress exercised that power in 1976, is the exercise of that power consistent with the due process clause?

Only if all three questions are answered "yes" can the Tenth Circuit's decision be sustained. Despite the importance of each of these questions, the Tenth Circuit failed to analyze questions (1) and (3), and decided question (2) based only on a footnote in the Secretary's appeal brief.

A. *Congress did not intend to reserve an unlimited power to change the terms of coal leases.*

In holding that FCLAA was a law that "otherwise provided" under section 7 of the Mineral Leasing Act of 1920, the Tenth Circuit did not analyze the meaning or intent of the "unless otherwise provided by law" clause. It apparently assumed that by this language Congress had reserved the power to impose whatever changes it wanted to upon readjustment of federal coal leases.

Such an assumption is belied by the legislative history of the Mineral Leasing Act of 1920. In enacting that law, Congress wanted to encourage investment of the huge financial resources necessary to develop a coal mine. 51 *Cong. Rec.* 14945 (1914) (statement of Rep. Thomson).[6] Indeed, Congress created the indeterminate term lease believing it would give coal lessees greater security

[6] Representative Thomson was a member of the House Public Lands Committee and a key proponent of the mineral leasing legislation. His statement in 1914 is relevant to interpreting the 1920 Act because the coal leasing provision was agreed upon in 1914 and did not change during the succeeding years in which Congress debated the more controversial aspects of the legislation.

for long-term development than other types of mineral leases. *Id.* Giving the Secretary of the Interior the power to readjust the terms and conditions of the leases at the end of 20-year intervals was designed only "to meet materially changed conditions." *Id.*

At issue here is not the Secretary's exercise of discretion to impose reasonable terms to meet materially changed conditions. Indeed, the Secretary claims he has no discretion in this case, and must impose the new lease terms—including the 12½ percent royalty—whether or not they are reasonable. Rather, at issue is whether Congress, by use of the phrase "unless otherwise provided by law" in Section 7 of the 1920 Act, reserved the unlimited power to dictate wholesale changes in the terms of issued leases. Interpreting the "unless otherwise provided by law" clause as reserving to Congress such an unusual power—in effect the power to cancel the lease at each twenty year interval—is contrary to and thwarts the goal of Congress in enacting the Mineral Leasing Act of 1920. As stated by Representative Ferris, who was a sponsor of the bill ultimately enacted in 1920 and Chairman of the House Public Lands Committee:

> The proposed bill, if passed, will put it on a decent, fair basis, so that the States will be developed, so that the Government may collect a royalty, *and so men may proceed in an orderly manner under a contract, so that men may know what their rights are and not have them swept away by withdrawal orders, changed rulings, and other changes in policy which the poor prospecter can neither fathom nor understand.* The claimants and the Government are both entitled to this much.

58 *Cong. Rec.* 7511 (1919) (statement of Rep. Ferris).

If Congress had truly intended to reserve the unlimited power to completely change the lease terms every twenty years, it is highly unlikely that the Nation's federally owned coal reserves would have been developed. As Con-

gress understood in 1920, a coal company cannot invest the huge financial resources necessary to develop a coal mine with the threat that Congress could make fundamental and unreasonable changes in the lease every 20 years, and say "take it or leave it." There is no indication in the language of the Act or its legislative history that Congress intended such a result.[7]

To the contrary, where Congress intended to reserve in the Government the power to change or even terminate the contract every twenty years, it did so by creating an entirely different kind of lease: a lease for twenty years with a preferential right in the lessee to renew. *See* 30 U.S.C. § 262 (1982) (sodium leases). The Solicitor of the Interior has recognized that Congress chose the "indeterminate term" for coal leases rather than the twenty-year term with a preferential right to renew in order to give coal lessees the greater long term security needed to develop coal. Solicitor's Opinion M-36943, *Sodium Lease Renewals*, 89 I.D. 173, 174-76 (1982). With no analysis or explanation, the Tenth Circuit's decision ignores Congress's distinction between indeterminate term leases and renewal leases.

B. *Congressional silence cannot trigger the exercise of such an unusual power to change a contract between the United States and private parties.*

Even assuming Congress reserved the unusual power to completely and radically change the terms of contracts between the United States and private parties, there is no support for the Tenth Circuit's decision that Congress exercised that power when it enacted FCLAA in 1976. The Tenth Circuit reached that conclusion because "we find nothing in our reading of FCLAA (1976), or in

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[7] None of the cases in which this Court has found a broad reserved power involve the language at issue here. *See, e.g., Bowen v. Public Agencies Opposed to Social Security Entrapment*, 106 S.Ct. 2390 (1986), where Congress expressly reserved "the right to alter, amend, or repeal any provision of" the act in question.

its legislative history, to indicate that FCLAA (1976) was *not* to be applied to pre-FCLAA coal leases on their post-FCLAA anniversary date." *FMC Wyoming Corp. v. Hodel*, 816 F.2d 496, 501 (10th Cir. 1987) (emphasis added). The court admitted that this interpretation results in a "drastic increase in royalty rate," but asserted that "such is a matter for Congress." *Id.*

It is ironic that the Tenth Circuit would consider such a drastic increase in royalties on pre-existing leases a "matter for Congress," but then sanction such an increase with no evidence of Congressional intent. In order to find that Congress has exercised such an unusual provision to alter contract rights, the court should have required evidence of specific Congressional intent to do so. Silence cannot be sufficient to trigger such a provision drastically altering contract rights between the United States and private parties. *See Perry v. United States*, 294 U.S. 330 (1934) (potential impairments of contracts between the United States and private parties should be subject to heightened scrutiny).[8]

C. *The exercise of any reserved powers in this case must be consistent with the due process clause.*

Although the limits of the reserved powers doctrine have never clearly been enunciated by this Court, in the *Sinking Fund Cases*, 99 U.S. 700, 718 (1879), the Court suggested that the exercise of a reserved power is limited by the due process clause, and thus by some notion of reasonableness. *See also Shields v. Ohio*, 95 U.S. 319, 324 (1877) ("The alterations must be reasonable . . . ."). Therefore, if Congress reserved the power in 1920 to completely change the terms of coal leases upon readjust-

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[8] The Tenth Circuit cites legislative history in 1978 to support its decision. 816 F.2d at 501, n. 11. That legislative history is not persuasive. In addition to the fact it was two years after FCLAA, Congress rejected language in the 1978 bill that would have applied FCLAA to pre-FCLAA leases upon readjustment.

ment, and if Congress exercised that power in 1976, the next question is whether the exercise of that power is reasonable.

The application of FCLAA indiscriminately to all pre-FCLAA leases is not reasonable. In 1984, a Commission appointed by Congress to study the federal coal leasing program established by FCLAA concluded that Congress "may have set the 12.5 percent minimum royalty without extensive economic analysis" and apparently just carried over the royalty rate from oil and gas leases. Report of the Linowes Commission, *Fair Market Value Policy for Federal Coal Leasing*, 314 (Feb. 1984). Moreover, the Commission found that "there are major differences in the economics of coal mining among coal regions in the West" and that a royalty rate reasonable for one area might not be reasonable for another. *Id.* at 316.

The Linowes Commission Report deals with new leases issued pursuant to FCLAA, not the readjustment of pre-FCLAA leases. However, if a 12½ percent minimum royalty can be considered unreasonable for new leases containing that rate from their inception, such a royalty is patently unreasonable where lessees have spent millions of dollars developing coal mines in reliance on the terms of pre-FCLAA leases imposing a much lower royalty subject to a "reasonable" readjustment.

In responding to FMC's petition for rehearing below, the Secretary cited *Bowen v. Public Agencies Opposed to Social Security Entrapment*, 106 S.Ct. 2390 (1986), where the Court stated that commercial contracts entered into by the United States remain subject to the "sovereign power" unless surrendered in unmistakeable terms. *Id.* at 2397. The Court implied that such a reserved power had few, if any, limitations. *Id.* In addition to the fact *Bowen* involved different statutory language, it also concerned the sovereign power "to implement a comprehensive social welfare program . . . ." *Id.* Similarly,

in *Bowen* the Court relied upon *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), which involved the sovereign power to impose a tax. In the present case, by contrast, the United States is not exercising a uniquely sovereign power such as the power to protect social welfare or to impose a tax. Instead, it is exercising its power as landowner to develop the terms of mineral leases. Therefore, *Bowen* does not apply.

However, given the Secretary's position that *Bowen* applies to legislation that he claims changes the terms of mineral lease contracts, the Court should grant certiorari to provide guidance on whether the Federal Government has the power to change the terms of mineral leases in any way it chooses. If the Government has such a power, it will have a dramatic impact on development of mineral resources on the public lands.

II. The Ramifications of the Tenth Circuit's Decision Are Enormous.

The Tenth Circuit's decision also warrants review because of its enormous ramifications. There are currently 429 pre-FCLAA coal leases in effect covering some 12.2 billion tons of coal.[9] If the Tenth Circuit's decision stands, and the royalties are uniformly increased from an average of 17½ cents per ton to 12½ percent, royalty costs will not merely double or triple, but will increase by some *ten* to *twenty* times, depending on the coal region involved. If only two billion tons of coal under pre-FCLAA leases are mined by the year 2000—a conservative assumption because 163.9 million tons of federal coal were mined in fiscal year 1986[10]—this could increase the

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[9] Telephone interview with the Department of the Interior's Division of Solid Minerals (Oct. 30, 1987).

[10] U.S. Department of the Interior, *Federal Coal Management Report, Fiscal Year 1986* at 1 (June 1987).

coal industry's royalty costs by some two *billion* dollars during that period.[11] To further illustrate the economic effects of the Tenth Circuit's decision, the increased royalties from readjustment of two leases at AMAX's Belle Ayr and Eagle Butte mines in Wyoming are in excess of 35 million dollars for the past two years.

This is not just an increased cost to be borne by the coal industry. Many coal companies can pass these increased royalty costs on to their customers—generally electric utilities—under long-term coal supply agreements. Amicus Colorado-Ute is in precisely this situation. These utilities will be forced to pass on this cost to their customers. The end result is that much of the huge increase in royalties will be paid by the public in states where utilities burn federal coal. These states are not just in the West where the coal is produced, but include, *e.g.*, Texas, Minnesota, Wisconsin and Illinois.[12]

In addition to the economic impact, the Tenth Circuit's decision has extensive ramifications in terms of the lands affected. Pre-FCLAA coal leases cover more than 700,000 acres of public lands in fourteen different States.[13] Furthermore, the "unless otherwise provided by law" language is not unique to coal leases. Congress also used that phrase in the leasing provisions of the Mineral Leasing Act of 1920 for phosphate (30 U.S.C. § 212) and

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[11] In 1985, the average coal price in the West was about $14 per ton. U.S. DOE/EIA, *Annual Coal Production for the Year 1985.* Information for 1986 is not yet available. To be conservative, we have calculated these additional royalty costs by using an average price of $10 per ton over the next 13 years.

[12] Not all federal coal is sold to utilities under long-term contracts that permit a pass through of increased royalties. For example, FMC's coal is not sold under such a contract. Where coal is not sold under long-term contracts, the lessee must increase the price of coal to recover the increased royalty cost. If the market will not permit increasing the price, the lessee will bear the increased costs.

[13] Office of Technology Assessment, *supra* note 1, at Appendix D.

sodium leases (30 U.S.C. § 262), and in a 1927 statute dealing with potash leases (30 U.S.C. § 283). Consequently, this case is similar to *Andrus v. Utah*, 446 U.S. 500, 506 (1980), where the Court granted certiorari to resolve "a significant issue regarding the disposition of vast amounts of public lands."

III. Supreme Court Review is Necessary to Resolve the Flood of Pending Cases in the Board of Land Appeals and the Lower Courts.

Because of the timing of lease readjustments to correspond with leases issued in the 1960's, *FMC* represents just the tip of the iceberg of lease readjustment litigation.

According to a 1987 General Accounting Office Report, as of September 30, 1986, 167 pre-FCLAA leases had been readjusted; 98 lease readjustments were in various stages of appeal: 78 were pending in the Interior Board of Land Appeals, and 20 were pending in various courts.[14] During the past year, the Board of Land Appeals has decided many of its pending cases (appeals of which are being filed in district court), but about 33 cases remain.[15] Since between 200 and 300 pre-FCLAA leases have not yet been readjusted, the back-log of cases in the Department will only get worse.

Although we have not compiled a complete listing of cases pending in the U.S. district courts, there are cases now pending in district courts within three different circuits: the Tenth, Ninth and D.C. Circuits. At least three cases are pending in the U.S. District Court for the District of Wyoming,[16] and at least two cases are pending

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[14] U.S. General Accounting Office, *Coal Lease Readjustment and Revenue Collection* 17 (Aug. 1987).

[15] Telephone interview with counsel for the Board of Land Appeals (Oct. 29, 1987).

[16] *Exxon Coal U.S.A., Meadowlark Farms, supra* note 2, and *Ark Land Company v. Hodel*, No. C85-313K (D. Wyo. October 1, 1987).

in the U.S. District Court for the District of Colorado.[17] Two cases are or will soon be pending in the U.S. District Court for the District of Montana.[18] Three cases are pending in the U.S. District Court for the District of Columbia, and we understand other companies are preparing appeals to be filed there.[19] Other U.S. district courts and circuits could eventually become involved because pre-FCLAA coal leases are also in effect in the States of Alaska, Alabama, California, Kentucky, North Dakota, New Mexico, Oklahoma, Oregon, Pennsylvania, Utah and Washington.[20] Accordingly, even if the Tenth Circuit's decision in *FMC* will govern other cases filed in district courts within that Circuit, it will not end the lease readjustment litigation.

In view of the importance of the issues, the enormous economic impact, and the public lands affected in fourteen States, the Court should grant certiorari and resolve these issues now rather than waiting for a possible conflict among the circuits. Supreme Court review of these important issues now would avoid several years more of litigation in the Tenth and other circuits. Furthermore, if this Court waits for a conflict among the circuits, lessees who unsuccessfully pursued appeals in the Tenth Circuit may not be able to benefit from Supreme Court review of a decision from another circuit. Fair and uni-

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[17] *Powderhorn Properties v. Hodel*, No. 87-K-350 (D. Colo. filed March 10, 1987); *Trapper Mining Inc. v. Hodel*, No. 87-Z-979 (D. Colo. filed July 2, 1987).

[18] *Consolidated Coal Co. & Chevron Coal Co. v. Hodel*, No. CV85-361 BLG-JFB (D. Mont. filed Dec. 2, 1985); Western Energy Company is in the process of filing an appeal in Montana from *Western Energy Co.*, IBLA 86-1244 (1987).

[19] *Peabody Coal Co., et al., Hodel*, No. 87-1359 (D.D.C. filed May 20, 1987); *Colowyo Coal Co. v. Hodel*, No. 87-2325 (D.D.C. filed August 21, 1987); *Western Fuels-Utah, Inc. v. Hodel*, No. 87-2669 (D.D.C. filed Sept. 29, 1987).

[20] Office of Technology Assessment, *supra* note 1, at Appendix D.

form administration of public land mineral leases requires that certiorari be granted in this case.

CONCLUSION

For these reasons, amicus curiae National Coal Association, *et al.*, urge this Court to grant certiorari.

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